SUPREME COURT, U. S.

SEP 16 19

MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-97

ROGER JON DIAMOND; WILLIAM DUXLER; and PEOPLE'S LOBBY, INC.,

Petitioners,

vs.

FRANK BLAND, Sheriff of San Bernardino County; LOUIS J. FORTUNA, Chief of Police of City of San Bernardino; LOWELL E. LATHROP, District Attorney of San Bernardino County; James LAMBERT; C.H. BARRET; AL C. BALLARD, Mayor of City of San Bernardino; and HOMART DEVELOPMENT COMPANY,

Respondents.

PETITIONERS' REPLY BRIEF

ROGER JON DIAMOND
Attorney at Law
15415 Sunset Boulevard
Pacific Palisades
California 90272
(213) 454-1351

Attorney for Petitioners.

PEOPLE'S LOBBY PRESS LOS ANGELES

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-97

ROGER JON DIAMOND; WILLIAM DUXLER; and PEOPLE'S LOBBY, INC.,

Petitioners,

vs.

FRANK BLAND, Sheriff of San Bernardino County; LOUIS J. FORTUNA, Chief of Police of City of San Bernardino; LOWELL E. LATHROP, District Attorney of San Bernardino County; James LAMBERT; C.H. BARRET; AL C. BALLARD, Mayor of City of San Bernardino; and HOMART DEVELOPMENT COMPANY,

Respondents.

PETITIONERS' REPLY BRIEF

Respondents Homart Development Company, James Lambert and C. H. Barrett (hereinafter "respondents") argue in their brief in opposition to the petition for a writ of certiorari that this case involves nothing more than a factual dis-

pute resolved by the state courts against petitioners. This view of the case is simply incorrect. Neither the California Supreme Court's four-to-three split nor the Court of Appeal's two-to-one split involved a factual dispute. The different opinions rendered by the majorities and dissenters of those courts related solely to their views of the application of Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) to the undisputed facts of the instant case.

Until respondents filed their Brief in Opposition with this Court, they did not consider this case to involve a factual dispute.

Mr. Allen B. Gresham, attorney for respondents throughout these proceedings, advised the trial court when the matter was first before it on November 14, 1969:

> "MR. GRESHAM: Yes, your Honor. I wonder, before I did, though, if I might make a brief opening statement at this time. As Mr. Diamond has indicated to the Court and I think the Court will find, this is a very interesting case to deal with. It involves a very unique question of law and one which is of vital concern to a great many people.
>
> As has been indicated, I think the facts will be relatively easy to present to the Court and in most cases there will be little or no dispute. It is, as has been indicated, a question of the application of the law to this situation. . . ." (RT I, 4-5)

In their Memorandum of Points and Authorities filed with the trial court respondents admitted that "The testimony is generally uncontroverted." (CT I, 53).

The trial court and respondents both agreed that the case primarily involved a legal issue:

> "THE COURT: . . .
> Gentlemen, it would appear that pursuant to stipulation the situation is as you have indicated, counsel. This is primarily a legal question rather than [a] factual situation.
>
> MR. GRESHAM: Yes."
>
> (RT I, 9).

In their Reply Brief filed with the Court of Appeal in connection with petitioners' initial unsuccessful appeal to the Court of Appeal (Diamond v. Bland, 8 Cal.App.3d 58, 87 Cal.Rptr. 97 (1970), vacated and reversed by the California Supreme Court, 3 Cal.3d 653, 91 Cal.Rptr. 501, 477 P.2d 733 (1970), respondents stated at page 3,

> "Respondents agree with Plaintiffs that the facts are not in dispute."

What has been in dispute ever since this case began is the legal conclusion to be drawn from the facts. The courts below have grappled with this aspect of the case.

After respondents unsuccessfully

petitioned this Court for certiorari in an attempt to overturn petitioners' initial victory in the California Supreme Court, they moved the trial court to dissolve the permanent injunction and based their motion solely upon the ground that Lloyd Corp. v. Tanner, supra, required it as a matter of law. In response to their motion, the trial court ruled as a matter of law that where a nonrelated use is pursued at a shopping center there are necessarily effective alternative means of communication. In the court's own language:

> "This Court finds no distinction in the fact that Lloyd involved handbilling and this case involves initiative petition solicitation. In each instance, Lloyd held that, as a matter of law, there are necessarily effective alternative means of communication where a non-related use is sought to be engaged in on private property. . . ."
>
> (Pet. App. J, pp. A 73-74)

Thus, the California courts ruled as a matter of law, based on Lloyd, that there were effective alternative means available because the message of the initiative petition was unrelated to the shopping center. This ruling, then, was a legal conclusion, not an evidentiary finding. Respondents, in their Brief in Opposition, have attempted to transform a legal dispute into a factual dispute in order to persuade this Court to deny certiorari. As stated above, the facts are clear. They are not what so closely divided the California Supreme Court and

the Court of Appeal. What did divide these courts is, among other things, the same legal issue which divided the Oregon Supreme Court in Lenrich Associates v. Heyda, 504 P.2d 112 (Ore. 1972).

Respondents essentially conceded that the instant case is not factually the same as Lloyd Corp. v. Tanner when they filed a "Joint Motion For Leave to Engage in Oral Argument" in Lloyd Corp. v. Tanner, in which it is stated at page 2:

> "1. Homart and Diamond are uniquely qualified to provide assistance to this Court that is not otherwise available. The litigation in No. 1469 [Homart v. Diamond, October Term, 1970] raised recurrent and important questions, critical to an appropriate resolution of this controversy, apart from those presented by the parties hereto. For example, by granting this motion, the Court would gain the experience of Homart and Diamond's views on such additional significant aspects of the present dispute as . . . (c) whether the decision of the Court in the present case has equal force to an initiative solicitation campaign where the alternative channels of communication available are both less numerous and less effective . . . ."

Respondents assert in their Brief in Opposition that the California Supreme Court considered the factual differences between Lloyd and the instant case (Resp. Br., p.4).

As stated above, the California Supreme Court did not analyze the difference between handbilling and petition circulation. Respondents' reliance on U.S. v. Johnston, 268 U.S. 220 (1925) is misplaced. This Court merely stated that it "does not grant a certiorari to review evidence and discuss specific facts." 268 U.S. at 227. Petitioners are not asking this Court to review evidence and discuss specific facts. Petitioners are asking this Court to review legal conclusions based on uncontroverted facts. This is precisely what this Court did in Edwards v. South Carolina, 372 U.S. 229 (1963), wherein an examination of the record which contained no substantial conflict was conducted.

Respondents erroneously imply that this case involves nothing more than an interpretation by the California courts of California law (Resp. Br., pp. 2-3). Of course, if this were the case, respondents should not have attempted to persuade this Court to grant certiorari. See Homart Development Co. v. Diamond, 402 U.S. 988 (1971); Homart Development Co. v. Diamond, 404 U.S. 874 (1971); Homart Development Co. v. Diamond, 405 U.S. 981 (1972); Homart Development Co. v. Diamond, 409 U.S. 897 (9172). The majority of the California Supreme Court in the second Diamond v. Bland case clearly felt that respondents' federal constitutional rights precluded it from reaching the state constitutional issues presented (Pet.App. O, p. A 104). This Court has not hesitated to reverse a state supreme court decision which erroneously concludes that the federal constitution prevents the following of state law. See Olsen v. Nebraska ex. rel.

Western Reference & Bond Ass'n, 313 U.S. 236 (1941).

Respondents assert that petitioners mistakenly rely upon a "pre-Lloyd" case, Sutherland v. Southcenter Shopping Center, Inc., 3 Wash.App. 833, 478 P.2d 792 (Ct. App. 1970). Although this case was decided prior to Lloyd, the injunction issued in the case apparently remains intact. The case has not been overruled. It is precisely on point: it involves an initiative petition circulated on a shopping center pursuant to state law.

Respondents contend Police Department v. Mosley, 408 U.S. 92 (1972) and Grayned v. City of Rockford, 408 U.S. 104 (1972) are distinguishable because they involved picketing on public property. Whether the property is public or private cannot be determinative, however. Otherwise this Court would have overruled Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968).

In Steffel v. Thompson, ___ U.S. ___, (1974) this Court necessarily, at a minimum, must have concluded that Lloyd did not absolutely bar the activity in question (handbilling at a shopping center). Otherwise, this Court would have simply ruled the controversy was no longer a continuing one.

For the reasons stated in the petition and this reply brief, certiorari should be granted to decide the questions presented and unanswered by Lloyd Corp. v. Tanner.

Respectfully submitted,

Roger Jon Diamond

ROGER JON DIAMOND
15415 Sunset Boulevard
Pacific Palisades
California 90272

Attorney for Petitioners.

CERTIFICATE OF SERVICE

I, Roger Jon Diamond, declare as follows: I am an attorney at law duly admitted to practice before the Supreme Court of the United States, and I am the attorney for Petitioners.

On 9/12/74, 1974, pursuant to Rule 33 of the Supreme Court Rules, I caused the within Petitioners' Reply Brief to be served on all respondents, the California Supreme Court, the California Court of Appeal, Fourth Appellate District, the San Bernardino County Superior Court, and on California Secretary of State Edmund G. Brown, Jr., amicus curiae in the California Supreme Court, and the American Civil Liberties Union of Southern California, amicus curiae in the California Supreme Court, by placing three copies thereof enclosed in a sealed envelope with first class postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Court of Appeal
Fourth Appellate District
640 State Building
303 West Third Street
San Bernardino, Calif. 92401

V. Dennis Wardle, Clerk
San Bernardino Superior Court
351 North Arrowhead Avenue
San Bernardino, Calif. 92401

Lonergan, Jordan, Gresham
& Varner
Allen B. Gresham, Esq.
398 West Fourth Street
San Bernardino, Calif. 92401

Lederer, Fox and Grove
Lawrence M. Cohen, Esq.
233 South Wacker, Suite 7916
Chicago, Illinois 60606

A. L. Wirin
Fred Okrand
John D. O'Loughlin
Jill Jakes
323 West Fifth Street
Los Angeles, Calif. 90013

Ralph H. Prince, City Attorney
300 North "D" Street
San Bernardino, Calif. 92418

Paul A. Grube, Jr.
Deputy County Counsel
157 West Fifth Street
San Bernardino, Calif. 92401

Daniel H. Lowenstein, Esq.
111 Capitol Mall
Sacramento, Calif. 95814

California Supreme Court
350 McAllister Street
San Francisco, Calif. 94102

I further certify that all parties required to be served have been served.

Roger Jon Diamond

Roger Jon Diamond

15415 Sunset Boulevard
Pacific Palisades
California 90272